

UNITED STATES DISTRICT COURT
(DISTRICT OF MASSACHUSETTS)

MARILYN KUNELIUS,)	
PLAINTIFF)	
)	
V.)	
)	
TOWN OF STOW separately, A)	
PARTNERSHIP OF UNKNOWN NAME)	CIVIL ACTION NO. 05-11697-GAO
BETWEEN TOWN OF STOW and THE)	
TRUST FOR PUBLIC LAND, THE)	
TRUST FOR PUBLIC LAND separately)	
and CRAIG A. MACDONNELL, in his)	
individual capacity,)	
DEFENDANTS.)	
)	

MOTION TO STRIKE DEFENDANTS' MOTION TO DISMISS

Plaintiff Marilyn Kunelius ("Kunelius"), by and through her counsel, Michael C. McLaughlin, hereby moves to strike Defendants' joint Motion to Dismiss the Complaint pursuant to Fed. R. Civ. P. 12(f) for the reasons set forth as follows.

1. On September 29, 2005, Defendants filed a Motion to Dismiss the Complaint in the above referenced matter, along with a supporting Memorandum of Law.
2. The parties agreed to extend the time within which Plaintiff could oppose the motion until and including November 3, 2005. Plaintiff is filing its Opposition to Defendants' Motion today, along with this Motion to Strike.
3. Defendants' Motion to Dismiss includes a lengthy "Background" statement along with their iteration of the facts. Defendants' Motion to Dismiss, pp. 2-7.

4. Footnote 2 on page 2 of the Defendants' Motion to Dismiss states: "The facts set forth in this section are offered to provide additional context. To the extent they go beyond the allegations of the Complaint, they are not material to the Motion to Dismiss. The material facts are set for in the Complaint and its exhibits, as recited in the Statement of Facts."
5. As Defendants well know, and indeed acknowledge in footnote 2 as well as in their statement of the Standard of Review, it is entirely improper for Defendants to add any additional facts, even under the guise of "context", in their Motion to Dismiss. Pursuant to Fed. R. Civ. P. 12(b)(6), the facts to be considered in evaluating a Motion to Dismiss are *only* the facts as pled in the Plaintiff's Complaint. All other facts are irrelevant.
6. Defendants' attempt to amend new facts into their Motion under the pretext of "context" is a bald-faced attempt to circumvent the Federal Rules as well as established precedent in order to put before the court facts that are not included in the Complaint.
7. Defendants may not attempt to circumvent the rules, and then excuse themselves for having done so by dropping a *mea culpa* footnote. This is inexcusable practice.
8. This behavior by Defendants so taints the process and procedures for fair consideration of their Motion to Dismiss that their motion should be denied pursuant to Fed. R. Civ. P. 12(f) on the grounds that the Defendants' attempt to augment the background and facts is impertinent, scandalous, and, by Defendants' own admission, any additional background or facts they provide are immaterial.
9. In the alternative, at a minimum, Plaintiff moves to strike pages 2 – 7 of the Motion to Dismiss, as well as any references anywhere in the motion to any facts contained in pages 2 –7.

WHEREFORE, Plaintiff Marilyn Kunelius respectfully requests that this Court strike the Defendants' Motion to Dismiss, in full, or in the alternative, strike the Background and Facts section of the Motion to Dismiss.

Respectfully submitted,

Marilyn Kunelius,
By Her Attorney

LAW OFFICES OF MICHAEL C. MCLAUGHLIN

Dated: November 3, 2005 By: /s/ Michael C. McLaughlin, Esq.
(BBO# 367350)
One Beacon Street, 33rd Floor
Boston, MA 02108
(617) 227-2275

CERTIFICATION UNDER LOCAL RULES 7.1

I, Michael C. McLaughlin, certify that I have conferred with opposing counsel and have attempted in good faith to resolve and narrow the issue.

Dated: November 3, 2005

/s/ Michael C. McLaughlin, Esq.

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